BRIGHTON INDUSTRIES (M) SDN. BHD.

v.

SUPREME-QBE INSURANCE BHD.

HIGH COURT MALAYA, JOHOR BAHRU
LC VOHRAH J
[CIVIL SUIT NO. 23-1034 OF 1986]
23 APRIL 1992

INSURANCE: *Wilful misconduct - Arson alleged - Standard of proof.*

By a policy of insurance dated 10 June 1985, the defendant agreed to insure the machinery, plant, equipment, stock-in-trade and office equipment of the plaintiff, a sewing thread manufacturer, at its factory and plant.

On 6 July 1985, a fire broke out at the plaintiff's factory at about 11.30 pm.

The plaintiff duly submitted a claim under the policy for RM718,690.13. The defendant after an investigation as to the cause of the fire, by a letter dated 7 January 1986 rejected the claim pursuant to Clause 13 of the policy on the ground that the fire had been deliberately caused.

As a consequence, the plaintiff brought the present action for a claim under the policy.

The only issue for the determination by the Court was whether the fire was caused by the wilful act or with connivance of the plaintiff.

Held:

[1] Where serious allegations are made that is with regards to the wilful misconduct on the part of the plaintiff, a very high degree of probability within the general standard has to be applied.

[2] The defendant had to conform to this strict test in order to establish that the fire was caused by the plaintiff's wilful act or with its connivance.

[3] Based on the facts, the defendant had established a high degree of probability that the fire at the factory was set wilfully or with the connivance of the plaintiff.

[Plaintiff's suit dismissed with costs.]

Cases referred to:

Slattery v. Mance [1962] 1 QB 676 ***(cit)***
S. & M. Carpets (London) Ltd. v. Cornhill Insurance Co. Ltd. [1982] 1 LTR 667 ***(foll)***

For the plaintiff - C.Y. Tia; M/s. Tia & Noordin
For the defendant - D. Morais; M/s. Shearn & Delamore

JUDGMENT

LC Vohrah J:

By a policy of insurance dated 10 June 1985, the defendant agreed to insure the machinery, plant, equipment, stock-in-trade and office equipment of the plaintiff, a sewing thread manufacturer, at its factory and plant situated at no. 9 Jalan Kepong, Taman Jonor, Johor Bahru. The total sum insured was RM715,000. On 6 July 1985 a fire broke out at the plaintiff's factory at about 11.30 p.m. The fire department was notified of the fire at about 11.57 p.m.

and 3 fire engines arrived at the scene a few minutes after midnight and the fire was finally extinguished some three hours later at 03.22 a.m. The plaintiff duly submitted a claim under the policy for RM718,690.13 cents but the defendant after an investigation as to the cause of the fire by letter dated 7 January 1986 rejected the claim pursuant to Clause 13 of the policy on the ground that the fire had been deliberately caused. Clause 13 of the policy was worded as follows:

> If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy; or, **if the loss or damage be occasioned by the wilful act, or with the connivance of the insured**; or, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, or (in case of an arbitration taking place in pursuance of the 18th Condition of this policy) within three months after the arbitrator or arbitrators or umpire shall have made their award, all benefit under this policy shall be forfeited.
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> (Emphasis provided)

In the result the plaintiff brought the present action for a claim under the policy and the only issue for determination by the Court was whether the fire was caused by the wilful act or with the connivance of the plaintiff.

In *Slattery v. Mance* [1962] 1 QB 676 where arson was alleged by the insurer against the insured in repudiating liability, Salmon J had this to say (at p. 681):

> In my judgment, once it is shown that the loss has been caused by fire, the plaintiff has made out a *prima facie* case and the **onus is upon the defendant to show on a balance of probabilities that the fire was caused or connived at by the plaintiff**. Accordingly if at the end of the day the jury come to the conclusion that the loss is equally consistent with arson as it is with an accidental fire, the onus being on the defendant, the plaintiff would win on that issue.
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> (emphasis added)

It was conceded by the defendant that since the plaintiff had established that it had suffered a loss from the peril insured against, it was incumbent upon the defendant to establish wilful misconduct on the part of the plaintiff.

Whilst the civil standard of proof was applicable, my attention was properly drawn by learned Counsel for the defendant to the fact that in cases where serious allegations are made (such as in the present case), a very high degree of probability within the general standard has to be applied on the authority of *S. & M. Carpets (London) Limited v. Cornhill Insurance Co. Limited* [1982] 1 LIR 667 at p. 668. In considering the evidence I therefore reminded myself that the defendant had to conform to this strict test in order to establish that the fire was caused by the plaintiff's wilful act or with its connivance.

The defence sought to establish arson on the part of the plaintiff to the required standard essentially through the evidence of its expert, Keith Richard Spanswick (DW2). It was clear from the resume of his curriculum vitae 'D5', giving his academic qualifications and professional experience, and from his evidence, showing that he had investigated 300 to 400 fires and given evidence in Court as an expert in fire claims in 40 to 50 cases either on behalf of insurers or private individuals, that he was a very experienced and highly competent investigator whose opinion had to be given considerable respect. He testified that he first visited the factory on 11 July 1985, 5 days after the fire to determine the source of the fire.

In the course of his investigations he ascertained that either the storekeeper of the factory, Goh Kok Suan (PW3), or the factory's mechanic, Koh Seng Lee (PW4), was the person responsible for locking up the factory. They both informed him that no kerosene, diesel or gasoline was stored in the factory and that smoking was prohibited in the factory. Upon examination of the contents of the factory represented by the plan 'D6' he drew, after taking into account alterations suggested by PW3 to a sketch he had originally drawn, he determined that the seat of the fire was the point marked 'X' in the plan which was practically in the centre of the factory. He came to that conclusion upon examination of the structural beams supporting the roof of the factory which showed that they had collapsed inwards towards the point X, characteristic of the direction of collapse due to heating effects. He was able to refine the location more accurately by examination of steel shelves at the centre of the factory which had melted at the point X indicating high temperatures at approximately 1500 degrees centigrade. Later when he conducted chemical analysis of the debris he found traces of gasoline at points near the point X indicating that that was the seat of the fire. The presence of gasoline at the seat of the fire led him to the conclusion that the fire was deliberately lit because gasoline was not used in the factory and there was no reason for its presence there. DW2's finding of gasoline near the seat of fire was made by taking samples from the area and chemically analyzing them by means of a Variant 3400 gas chromatograph. The forensic scientist, Siow Kwen Sia (PW2), called as an expert by the plaintiff, had visited the factory earlier on 7 July 1985 to investigate the fire at the instance of the police in his then capacity as government chemist. In his report 'P1' he stated that he "examined the burnt debris but did not detect the presence of any inflammable hydrocarbon" and "was unable to determine the exact seat and the cause of the fire." However, under cross-examination he stated that had he himself tested a sample by the Variant 3400 method and found "the result was positive then [he] would be completely satisfied that there was inflammable hydrocarbon." He went further to state that if there had been "illegitimate presence of inflammable hydrocarbons" in the scrapings from the centre of the factory he would have concluded that there was arson. It was clear from the evidence of PW2 that his investigation at the factory on 7 July 1985 was somewhat inadequate. He admitted in cross-examination that he did not pay any particular attention to the beams and that if he were investigating "this fire **today** [he] would have done a beam deformation analysis" and would look at the direction the beams sagged to determine the fire. He also admitted using only his sense of smell to detect the presence of inflammable hydrocarbons by going round the factory picking up partially burnt debris and sniffing at it "more at the office end". He further admitted that he did not dig into the floor level to examine for gasoline or clear the debris to look for spalling which would indicate the presence of hydrocarbons. He also agreed in cross-examination that if he had noticed all the observations made by DW2 with regard to the beam deformation pattern pointing towards the centre of the factory, the presence of gasoline near the centre of the factory and spalling at the centre of the factory, he would have concluded that the fire was deliberately started at the centre of the factory.

On the strength of the evidence above-stated, proffered by two experts, one from each side, whose credentials and integrity I had no reason to question, I was more than satisfied that the defence had established to a high degree of probability that the fire was the result of a wilful act. I came to this conclusion despite the evidence of ASP Abdul Aziz bin Abu Bakar (PW1) that the police investigation file disclosed no suspicion of any misdeed. He did not elaborate and I did not think much turned on his evidence as police officers cannot be expected to be experts in the field of fire investigations without special training.

As to access to the factory, the plan D6 and the photographs showed that it was provided by a sliding steel door at the front of the building and by a wooden door at the rear. A steel collapsible gate provided further security to the rear door. Louvered windows with bars ran all round the factory as shown by the photographs designated as "Figure 4", "Figure 5" and "Figure 6" of D3. DW2 testified that he had examined the site in detail for forced entry and found no forced entry except that effected by the firemen when they apparently forced open one half of the sliding steel door at the main entrance in order to gain entry into the factory as evidenced by the burn marks on the sliding door indicating that the door must have been in place during the fire. He had examined the bars of the window and had found them to be intact in that they had not been cut or abnormally bent to indicate a break-in. He did find two gaps in the asbestos sheeting above the wall of the factory building as shown in photograph no. 33 of D4 but these gaps did not indicate the break-in points of the arsonist because the buckling of the asbestos sheeting indicated that it resulted from the collapse of the roof structure. Further, his discussions with the Fire Brigade Department and the black smoke marks on the inside of the asbestos indicated that it had been in place and had been removed by the fireman "to assist in ventilation for the clearing of smoke." I was satisfied from his oral evidence and the report D3 he submitted that he had examined every avenue for forced entry and found none except that through the main sliding door forced open by the firemen for the purpose of putting down the fire. I was accordingly satisfied that the arsonist, whoever he was, must have gained entry with keys which according to the evidence were only in the possession of PW3 and PW4. I was also satisfied, insofar as motivation was concerned, that there was cogent evidence to indicate that the fire was not unwelcome having regard to the unsatisfactory financial position of the plaintiff at the material time. This was furnished by Low Kah Han (DW1), the Loss Adjuster from Thomas Howell Kiewit (Malaysia) Sdn. Bhd., International Adjusters & Surveyors, employed by the defendant to investigate the cause of the fire, the extent of the damage it caused and the quantum of the loss. As a result of his investigations he put up a report D4 in which he stated (at p. 3):

> We are also aware that the insured had business dealing since July 1984 with a company known as M/s. Poh Hua Hun (M) Sdn. Bhd., where this company consigned their own stock of yarn and thread for rewinding. This company was requested by your insured to arrange their own fire insurance and cover was arranged at RM80,000 with M/s. Hong Leong Assurance with effect from 5 July 1985 that is one day before the fire.

When cross-examined on this passage he replied:

> ... I also handled the claim by Poh Hua Hun (M) Sdn. Bhd. and was told by the owner that he was advised by the plaintiff claimant to take up its own insurance of its stock that is Poh Hua Hun stock. I felt there was something wrong in the advice given because it was one day before the fire. There were goods of Poh Hua Hun in plaintiff's factory and the standard fire policy excludes goods held in trust or on commission. The advice would indicate that the claimant knew that there was going to be a fire.

This view was supported by the actual trade figures of the plaintiff showing that there was a decline in sales and purchases made by the plaintiff as shown at p. 6 of D4. His oral evidence on this point was as follows:

> Based on the accounts submitted by the insured we noted that their sales for the year 1983 were at RM2.5 million and in 1984 the sales had declined to RM1.9 million depicting a decline of 25.9%. By the middle of 1985 sales were recorded at RM315,000. To project for the whole year of 1985, the estimated sale would be RM630,000 - that is doubling the figure. This will show a shortfall of 66.5% from the previous year. I refer to p. 6.

> The purchases for 1983 were recorded at RM2.7 million and by 1984 it had declined to RM1.35 million whereby there was a decline of 50.3%. By July 1985 the purchases were at RM96,757. To project for the whole of 1985 the purchases would be RM192,000. This will depict a decline of 85.7%. By purchases I mean purchases of raw materials like yarn and thread. By sales at p. 6 these would be sales of finished products - spools of thread.

Further, the evidence of a former director of the plaintiff, Phua Kok Huat (PW5), elicited in cross-examination also indicated that the business of the plaintiff had declined from 1983 to 1985 but he denied that "the business of the company was going down very rapidly." He stated further that as at the time of the fire the plaintiff was "generally indebted to various creditors but not to the extent of a large amount" but did not elaborate by giving any figures. He had, however, earlier in his affidavit in support of the plaintiff's application for early trial deposed to on 16 March 1987 stated in para. 4:

> Further, creditors who sold materials to the plaintiffs are also pressing the plaintiffs for payments which are long overdue. Some are even getting abusive and many others are threatening to take legal proceedings to recover amounts due.

I was more than satisfied on the above evidence that the plaintiff was in bad financial shape and had a motive to wish to have the premises burnt down.

There were also other considerations which detracted from the integrity of the plaintiff's claim. PW4, who was a principal witness for the plaintiff, was not, in my view, a very reliable witness. In Court he had described himself as a mere mechanic in the factory whose function was solely to repair any machine should it break down when in point of fact he was the effective manager of the factory and a substantial shareholder of the plaintiff. A valid question was posed by the defendant: Could it be that he wanted to avert any suspicion that he would be a substantial beneficiary under the claim? This question took on greater significance when it was revealed in evidence that soon after the fire a minor official of the plaintiff in the person of a Miss Sim, a clerk in the employ of the plaintiff, attended on DW1 for the rather large claim immediately after the fire when in the circumstances one would have expected someone higher up in the managerial hierarchy such as the effective manager PW4 or the newly-appointed manager/director PW5 to have done so. It seemed to me to be also very significant that the fire should take place less than one month after the policy was taken out by the plaintiff.

All the facts above described impelled me to the conclusion that the defendant had succeeded on a high degree of probability to establish that the fire at the factory was set wilfully by or with the connivance of the plaintiff in order to make the claim under the policy of insurance. I did not think, as was urged by learned Counsel for the plaintiff, that it was necessary for the defendant to show additionally or specifically that either PW3 or PW4, both of whom had possession of the keys, was actually at the scene at about the time of the outbreak. That I thought would be placing too high a burden upon the defendant despite its obligation to conform to a high civil standard of proof. I accordingly dismissed the plaintiff's suit with costs.

Also found at [1992] 3 CLJ 1424